

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

THOMAS KETCHUM, JR.

PLAINTIFF

vs.

Civil Action No. 1:97cv410-D-D

LAWRENCE SHAW

DEFENDANT

*CONSOLIDATED WITH*

THOMAS KETCHUM, JR.

PLAINTIFF

vs.

Civil Action No. 1:97cv292-D-D

CONDOR RELIABILITY SERVICES, INC.

DEFENDANT

MEMORANDUM OPINION

Presently before the court is the motion of the defendants Lawrence Shaw and Condor Reliability Services, Inc. (“Condor”), for the entry of summary judgment on their behalf with regard to the plaintiff’s claims at bar. Finding that the motion is well taken, the court shall grant the motion. In light of the preemptive effect of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, this court does not possess jurisdiction over the matter at bar. The plaintiff’s claims shall be dismissed without prejudice so that he may pursue his claims in the appropriate forum.

I. Factual and Background<sup>1</sup>

During the time period relevant to the plaintiff’s claim in the cause at bar, the defendant Condor employed the plaintiff, Thomas Ketchum, Jr., as a weather observer. Sometime during the spring of 1997, the plaintiff engaged in discussions with other employees of Condor concerning the potential joining of or formation of a labor organization. The plaintiff contends that numerous acts of retaliation by Condor and Shaw against him and other employees

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<sup>1</sup> In ruling on a motion for summary judgment, the court is not to make credibility determinations, weigh evidence, or draw from the facts legitimate inferences for the movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Rather, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 255. The court chooses not to provide an in-depth discussion of all of the facts surrounding this case, but rather will discuss pertinent facts in the body of its opinion as they become necessary.

followed in the months after the spring discussions. More precisely, Ketchum charges that the defendants

hired a new part-time employee for Condor Reliability Services, Inc. and promptly offered this most junior employee both more hours and more desirable hours of employment than the four (4) more senior, qualified employees who were only permitted to work part-time even though each of these employees, including the plaintiff, had earlier openly expressed a desire for full-time employment with Condor Reliability Services, Inc.

[The defendants] employed this new, part-time employee [to] the detriment of the other, senior part time employees, including the plaintiff, in a malicious, unlawful attempt to punish both the plaintiff and the other part time employees for even discussing their grievances with each other, with out of state representatives of Condor Reliability Services, Inc., and with defendant Shaw, in violation of the social, civil and political rights of the plaintiff and the other employees as expressly provided in Amendment #1 of the Constitution of the United States of America, the National Labor Relations Act, and Title 79, Section I, Paragraph 9 of the Mississippi Code, as amended.

Plaintiff's Complaint ¶¶ 2,3. Consequently, in August of 1997, the plaintiff filed a complaint against Condor with the National Labor Relations Board ("NLRB"). According to the plaintiff's complaint, acts of retaliation by Condor and Shaw continued to occur:

Soon after the August 25, 1997 filing with the National Labor Relations Board, Condor Reliability Services, Inc., by and through their agent, defendant Shaw, posted a copy of the NLRB charge of the bulletin board and engaged at least two (2) part time employees in extended conversations designed to intimidate them into providing false statements in order the positions taken by Condor Reliability Services, Inc., and their agent, defendant Shaw, before the National Labor Relations Board.

Plaintiff's Complaint ¶ 6 (text as in original). Later that same month, the plaintiff withdrew his charge with the NLRB. Nevertheless, the plaintiff charges, the defendants continued to subject him to retaliatory treatment. See, e.g., Plaintiff's Complaint ¶ 9 (" . . . proceeded to remove the plaintiff from any further employment whatsoever on the new October, 1997 work schedule . . ."); ¶ 10 (asserting defendants "denied employees access to the Condor office in Tupelo 'unless in a duty status,' in an unlawful attempt to illegally restrict and limit the rights of Condor employees . . .").

On October 14, 1997, the plaintiff filed a *pro se* action against Condor in the Circuit Court of Lee County, Mississippi. Condor then removed the action to this court on November 18, 1997. Subsequently, the plaintiff filed another *pro se* action, this time against Lawrence Shaw, individually and as an agent of Condor. Shaw removed that action to this court on December 12, 1997. This

court then consolidated these two actions. Ketchum v. Shaw, Civil Action No. 1:97cv410-D-D (N.D. Miss. Feb. 27, 1998) (Order Consolidating Cases). The defendants have since moved this court to dismiss the plaintiff's claims, or in the alternative grant summary judgment on their behalf with regard to the plaintiff's claims. The central contention of the defendants with regard to the motion at bar is that this court lacks jurisdiction over the claims at bar because they all fall within the exclusive authority of the NLRB.

## II. Discussion

### A. Summary Judgment Standard

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden rests upon the party seeking summary judgment to show to the district court that an absence of evidence exists in the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986); see Jackson v. Widnall, 99 F.3d 710, 713 (5th Cir. 1996); Hirras v. Nat'l R.R. Passenger Corp., 95 F.3d 396, 399 (5th Cir. 1996). Once such a showing is presented by the moving party, the burden shifts to the non-moving party to demonstrate, by specific facts, that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); Texas Manufactured Housing Ass'n, Inc. v. City of Nederland, 101 F.3d 1095, 1099 (5th Cir. 1996); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). Substantive law will determine what is considered material. Anderson, 477 U.S. at 248; see Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 40 (5th Cir. 1996). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248; see City of Nederland, 101 F.3d at 1099; Gibson v. Rich, 44 F.3d 274, 277 (5th Cir. 1995). Further, "[w]here the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no

genuine issue of fact for trial." Anderson, 477 U.S. at 248; see City of Nederland, 101 F.3d at 1099. Finally, all facts are considered in favor of the non-moving party, including all reasonable inferences therefrom. See Anderson, 477 U.S. at 254; Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198 (5th Cir. 1995); Taylor v. Gregg, 36 F.3d 453, 455 (5th Cir. 1994); Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir. 1994). However, this is so only when there is "an actual controversy, that is, when both parties have submitted evidence of contradictory facts." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994); Guillory v. Domtar Industries Inc., 95 F.3d 1320, 1326 (5th Cir. 1996); Richter v. Merchants Fast Motor Lines, Inc., 83 F.3d 96, 97 (5th Cir. 1996). In the absence of proof, the court does not "assume that the nonmoving party could or would prove the necessary facts." Little, 37 F.3d at 1075 (emphasis omitted); see Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 111 L. Ed.2d 695, 110 S. Ct. 3177 (1990).

#### B. The National Labor Relations Act

The National Labor Relations Act ("NLRA") provides rights to employees pertaining to organized labor:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

29 U.S.C. § 157. Section 8 of the NLRA prohibits employers or their agents from engaging in unfair labor practices. 29 U.S.C. § 158. The initial provision in this statute which defines unfair labor practices prohibited by the NLRA dictates that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1). The National Labor Relations Board is vested with the exclusive authority to enforce the provisions of the NLRA. Sheet Metal Workers Local Union No. 54, AFL-CIO v. E.F. Etie Sheet Metal Co., 1 F.3d 1464, 1475 n.12 (5<sup>th</sup> Cir. 1993); Wells v. General Motors Corp., 881 F.2d 166, 169 (5<sup>th</sup> Cir. 1989) ("Congress vested exclusive jurisdiction in the NLRB over conduct that is 'arguably protected or arguably prohibited' by sections 7 and 8 of the NLRA.") (citing International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 394, 106 S.Ct. 1904,

1914, 90 L.Ed.2d 389 (1986)).

In order to preserve the primary jurisdiction of the NLRB, the NLRA requires that courts not regulate activities "when it is clear or may fairly be assumed that [such] activities . . . are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959); *accord* Belknap, Inc. v. Hale, 463 U.S. 491, 498, 103 S.Ct. 3172, 3177, 751 L.Ed.2d 798 (1983); Windfield v. Groen Div., Dover Corp., 890 F.2d 764, 767 (5th Cir.1989). This doctrine of preemption is broad, and encompasses claims that even only arguably come within the purview of the NLRA. Breiner v. Sheet Metal Workers Intern. Ass'n Local Union No. 6, 493 U.S. 67, 74, 110 S.Ct. 424, 429, 107 L.Ed.2d 388 ("[N]either state nor federal courts possess jurisdiction over claims based on activity that is 'arguably' subject to §§ 7 or 8 of the NLRA."); Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 286, 106 S.Ct. 1057, 1060, 89 L.Ed.2d 223 (1986); Branson v. Greyhound Lines, Inc., 146 F.3d 747 (5<sup>th</sup> Cir. 1997).

[T]he Garmon preemption doctrine not only mandates the substantive preemption by the federal labor law in the areas to which it applies, *but also protects the exclusive jurisdiction of the NLRB over matters arguably within the reach of the Act*. Even if [the plaintiff] had satisfied ordinary primary jurisdiction requirements, which he did not, he would not have taken adequate account of the decision of Congress to vest in one administrative agency nationwide jurisdiction adjudicate controversies with the Act's purview. Matters within the exclusive jurisdiction of the Board are normally for it, not a state court, to decide. This implements the congressional desire to achieve uniform as well as effective enforcement of the national labor policy.

Local 926, Intern. Union of Operating Engineers, AFL-CIO v. Jones, 460 U.S. 669, 680, 103 S.Ct. 1453, 1461, 75 L.Ed.2d 368 (1983) (emphasis added) (discussing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959)).

In determining whether the Garmon preemption applies,

[t]he critical inquiry in examining that conclusion is whether the controversy presented under state law to the courts is identical to or different from that which could have been, but was not, presented to the National Labor Relations Board, NLRB. Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 197-98, 98 S.Ct. 1745, 1757-58, 56 L.Ed.2d 209 (1978). That inquiry requires not only looking to the factual bases of each controversy, but also examining the interests protected by each claim and the relief requested. See Belknap, Inc. v. Hale, 463 U.S. 491, 510-11, 103 S.Ct. 3172, 3183-84, 77 L.Ed.2d 798 (1983); Sears, 436 U.S. at 188-89, 98 S.Ct. at 1752-53, 1758.

Sheet Metal Workers, 1 F.3d at 1469. Stating the test in another fashion, the Fifth Circuit has noted:

“The critical inquiry [ ] is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the Garmon doctrine was designed to avoid.” Sears, 436 U.S. at 197, 98 S.Ct. at 1757-58 (emphasis added). Thus we look at the “controversy” presented to the court and ask whether the Board could have adjudicated it instead.

Hobbs v. Hawkins, 968 F. 2d 471, 476 (5<sup>th</sup> Cir. 1992).

When looking to the asserted claims at bar, the undersigned cannot say that there are any claims by the plaintiff that are not properly addressable by the NLRB. The entirety of the plaintiff's allegations revolve around alleged violations of section 8 of the National Labor Relations Act. Indeed, the plaintiff himself contends in his complaint that most of the alleged actions of the defendants violate the NLRA. Plaintiff's Complaint ¶¶ 3, 10. The only claim that the plaintiff specifically directs this court to in his response as one which is not preempted is his claim that the defendant Shaw restricted employees' access to the Condor work site when not on duty.<sup>2</sup> Plaintiff's Response Brief, unnumbered page 3. In his complaint, however, he contends that this activity also violates the NLRA. Plaintiff's Complaint ¶ 10. Therefore, he concedes that this conduct is “arguably” within the jurisdiction of the NLRB.

Any other federal or state law claims that the plaintiff possesses merely compliment these claims, for they all arise from the same facts underlying the NLRA violations. Contrary to the assertion of the plaintiff, the mere fact that he alleges civil rights claims does not prevent preemption from applying. See, e.g., Britt v. The Grocers Supply Co., Inc., 978 F.2d 1441, 1447 (5<sup>th</sup> Cir. 1992); Hobbs v. Hawkins, 968 F.2d 471, 476 (5<sup>th</sup> Cir.1992) (determining civil rights claims under § 1983 preempted by NLRA). This court must look not to the particular causes of action

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<sup>2</sup> As an aside, the court notes that even if the plaintiff's claims were not preempted by the NLRA, the court could not permit the plaintiff to assert the rights of other Condor employees as he has no standing to do so. See, e.g., Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1251 (“A party seeking to enlist the court's jurisdiction ‘must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.’”) (quoting Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

charged, but to the facts underlying the causes of action in each particular case. When looking at the factual basis for the plaintiff's charges, as well as the underlying federal and state interests involved, the court must conclude that all of the plaintiff's claims presently before this court are preempted by the NLRA, and that this court has no jurisdiction to hear this action.

### III. Conclusion

After careful review of the submissions of the parties, the undersigned is of the opinion that the defendants' motion to dismiss, or in the alternative for summary judgment, should be granted. In that all of the plaintiff's claims arguably come within the jurisdictional purview of the National Labor Relations Board, this court does not have the authority to hear the plaintiff's claims. The defendants' motion shall be granted and the plaintiff's claims dismissed without prejudice so that he may seek review of those claims in the appropriate forum.

A separate order in accordance with this opinion shall issue this day.

This the \_\_\_\_ day of August 1998.

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United States District Judge

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CONDOR RELIABILITY SERVICES, INC.

DEFENDANT

ORDER GRANTING MOTION TO  
DISMISS, OR IN THE ALTERNATIVE  
FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

- 1) the motion of the defendants to dismiss, or in the alternative for summary judgment, is hereby GRANTED;
- 2) the plaintiff's claims in this cause are hereby DISMISSED WITHOUT PREJUDICE; and
- 4) these causes are CLOSED.

All memoranda and other matters considered by this court in granting this motion to dismiss, or in the alternative for summary judgment, are hereby incorporated by reference and made a part of the record in this cause.

SO ORDERED, this the \_\_\_\_\_ day of August 1998.

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United States District Judge